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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1353

WILLIAM J. KAUFMAN, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER WILLIAM J. KAUFMAN

HAROLD BAER, JR.
Counsel for Petitioner
WILLIAM J. KAUFMAN
80 Pine Street
New York, N.Y. 10005
(212) 344-2040

BRUCE J. BERMAN
GUGGENHEIMER & UNTERMYER
Of Counsel

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Petitioner William J. Kaufman in reply to the Government's brief dated July 1975, pursuant to Rules 24(4) and 24(5) of this Court, solely for the purpose of responding to the Government's

argument that the decision of this Court in United States v. Feola, No. 73-1123, 43 U.S.L.W. 4404 (decided March 19, 1975) disposes of Petitioner's argument that his conviction cannot be sustained without proof of an "anti-federal intent."

ARGUMENT

THE DECISION OF THIS COURT IN UNITED STATES v. FEOLA SUPPORTS THE PETITION FOR A WRIT OF CERTIORARI TO REVIEW THE CONSPIRACY ISSUES IN THIS CASE.

In his Petition for a Writ of Certiorari, Petitioner argued that his conviction under 18 U.S.C. §371 for conspiracy to defraud the United States was erroneously affirmed by the United States Court of Appeals for the Second Circuit, for two reasons.

First, Petitioner argued that federal jurisdiction does not extend to circumstances such as those in the case at bar, where no

federal interest was shown, and particularly where the Court of Appeals had held that the substantive offense, bribery of a public official under 18 U.S.C. §201, could not be made out because the person bribed was an employee of the New York City Model Cities Program. In effect, then, Petitioner was convicted under federal law for conspiracy to commit a crime against the State of New York.

Second, Petitioner argued that even if he could be so convicted, the Government would be required to prove an anti-federal intent, under the line of cases following United States v. Crimmins, 123 F.2d 271 (2d Cir. 1941). This argument is closely related to the jurisdictional one.[1]

The Government contends, in its brief

1. See decision of Judge Feinberg in United States v. Alsondo, 486 F.2d 1339, 1343 (2d Cir. 1973) [citing ALI, Model Penal Code §503] reversed on other grounds, United States v. Feola, supra.

in opposition, that Feola is controlling and thoroughly disposes of the latter argument. It sets forth no argument in support of its position, however, as if such a statement were self-evident. Petitioner submits, to the contrary, that the opinion of this Court in Feola provides strong support for Petitioner's position both on the merits and in favor of granting the petition for certiorari.

Feola differs substantially in its facts from the case at bar, appellants having been convicted not of a general conspiracy to defraud, but of conspiracy to commit a substantive offense, an offense of which they were also convicted. The distinction is crucial, since the Court's disapproval of the Crimmins rationale was expressly limited to the facts of

the case under review.[2]

Thus, this Court did not decide in Feola whether a conviction for conspiracy could stand where a substantive offense was not committed, which is precisely the question now before this Court. The Court did issue some dicta, however, which is pertinent to this case.

> ". . . the state of knowledge of the parties to an agreement is not always irrelevant in a proceeding charging a violation of conspiracy law. First, the knowledge of the parties is relevant to the same issues and to the same extent as it may be for conviction of the substantive offense. Second, whether conspirators knew the official identity of their quarry may be important, in some cases, in establishing the existence of federal jurisdiction. The jurisdictional requirement is satisfied by the existence of facts tying the proscribed conduct to the area of federal

2. Mr. Justice Blackman wrote, for the Court:

> "We conclude that the [traffice light] analogy, though effective prose, is, as applied to the facts before us, bad law." 43 U.S.L.W. at p. 4410 [emphasis added].

> concern delineated by the statute. Federal jurisdiction always exists where the substantive offense is committed in the manner therein described, that is, when a federal officer is attacked. Where, however, there is an unfulfilled agreement to assault, it must be established whether the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction. 43 U.S.L.W. at p. 4411 [emphasis added].

It could hardly be argued that there was a sustantial threat to federal interests where the role of the federal government was as remote as in this case, where no substantive federal crime was committed and where the conspiracy, if any, was directed, as were the actual bribes, toward a New York City employee.

Accordingly, Feola does not dispose of Petitioner's conspiracy argument, but indeed provides considerable support therefor. Moreover, the same reasons that induced the Court to review Feola should be equally force-

ful in inducing the Court to review Petitioner's conspiracy conviction, particularly where, under the facts of this case, the judgment of the Court of Appeals may have a far more substantial effect upon the scope of federal jurisdiction than did the same Court's judgment in United States v. Alsondo, supra.

CONCLUSION

For the reasons set forth above and the reasons set forth in the Petition of William J. Kaufman for Writ of Certiorari, it is respectfully submitted that the petition should be granted.

Respectfully submitted,

HOWARD BAER, JR.
Counselor for Petitioner
WILLIAM J. KAUFMAN
80 Pine Street
New York, N.Y. 10005

BRUCE J. BERMAN
GUGGENHEIMER & UNTERMYER
Of Counsel